LITIGATION IN BANKRUPTCY COURT: IT'S ALL ABOUT THE RULES

(Presented by Hon. Frank J. Bailey, Chief Judge, U.S. Bankruptcy Court, D. Mass. and Patrick P. Dinardo, Partner, Sullivan & Worcester LLP)

Most litigators having any familiarity at all with bankruptcy are aware of the concept of the "automatic stay", which enters immediately upon a person or entity seeking relief in U.S. bankruptcy courts. See 11 U.S.C. § 362(a). While that stay stops all pre-filing litigation and essentially bars any further action against the debtor without relief from the stay, litigation over a disputed claim can and often does continue in the Bankruptcy Court. Changing the locus of the dispute means that the litigation has entered an extremely fast paced and high stakes phase, one in which the civil litigator would do well to be intimately familiar with the applicable rules in bankruptcy court. Many of these rules vary depending on the type of proceeding at issue.

The filing of a bankruptcy gives rise to a "case," which refers to the debtor's request for bankruptcy relief. In addition, there may be specific disputes that arise in the case and those disputes give rise to litigation. There are primarily two kinds of "litigation" in Bankruptcy Court, "adversary proceedings" and "contested matters", but beware: discovery can occur in the absence of either one, in the "case" (for example, in a 341 meeting or a Rule 2004 exam), and what goes by the rather innocuous name of an "estimation proceeding" can often be outcome determinative. These types of litigation and the applicable rules are discussed below.

A. Adversary Proceedings.

An adversary proceeding can best be thought of as a civil action in Bankruptcy Court. The Federal Rules of Bankruptcy Procedure apply in these proceedings and many rules in Part VII (also known as the 7000 series) simply incorporate some of the Federal Rules of Civil Procedures in whole or in part. See e.g., Fed. R. Bankr. P. 7030, 7033 and 7034. Procedurally,

an adversary proceeding gives rise to an entirely separate docket from the main bankruptcy "case."

For a list of what constitutes an "adversary proceeding", see Fed. R. Bankr. P. 7001. These include a proceeding to recover money or property; a proceeding to determine the validity, priority, or extent of a lien or other interest in property; a proceeding to object to or revoke a discharge; a proceeding to obtain an injunction or other equitable relief; a proceeding to subordinate any allowed claim or interest; and a proceeding to obtain a declaratory judgment relating to any of the foregoing. The Advisory Committee Notes on the scope of Rule 7001 discuss in greater detail the types of cases which must comply with the adversary proceeding rules and procedures.

In addition to the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence also apply in Bankruptcy Court (under Fed. R. Bankr. P. 9017),* and many jurisdictions issue Local Rules and Standing Orders as well. See e.g. Mass. Local Bankr. R. 7026-1 and 7037-1. A litigator should note with care that many, but not all, of the Federal Rules of Civil Procedure apply to adversary proceedings and most, but not all, are contained in the 7000 series of the Bankruptcy Rules. Often the Court may issue a procedural order which may also govern the parties' pre-trial activity in an adversary proceeding. An example of such an order is annexed hereto as **Exhibit A**.

Finally, in larger Chapter 11 cases, the Court may have entered a series of general procedural orders that apply in all of the adversary proceedings arising in that "case."

* Civil litigators routinely joke about lax evidentiary standards in Bankruptcy Court, but ignoring the need to make out a prima facie case by competent evidence is a dangerous practice. Many judges in the Bankruptcy Court now take direct examination by affidavit but all insist on compliance with the evidentiary rules.

B. Contested Matters.

Once a motion is opposed or an objection to a claim is lodged, the dispute becomes a "contested matter," to which the Federal Rules of Bankruptcy Procedure (otherwise applicable in adversary proceedings) apply. These rules generally allow for all the discovery devices available in civil litigation. See Fed. R. Bankr. P. 9014(c). A litigator must peruse Rule 9014 carefully to determine which of the 7000 series of rules apply. Also, the Court may often enter a pre-hearing order in these contested matters, and an example of one such order is Exhibit B hereto.

Sometimes what starts out as a contested matter may actually be considered an adversary proceeding. See, e.g. In re Miramar Resources, Inc., 176 B.R. 45 (Bankr. N. Colo. 1994) (where a claim objection joined with a request for other relief, of the kind specified in Rule 7001, was considered an adversary proceeding). To the extent you think your case may be advanced by a determination from the Court as to the type of proceeding you are in, you should feel free to ask for it. If the issue is unclear, most judges will generally articulate that the matter will (or will not) be considered an adversary proceeding or contested matter, so that the parties can have a clear understanding of which rules will apply.

Of course, the utility of discovery being allowed in a contested matter cannot be doubted. The tools available to probe and investigate your adversary's arguments on a motion include requests for production of documents (and the analog for third parties, a subpoena duces tecum), written interrogatories, and, one of the most powerful tools, requests for admissions.

Knowledge of variation in the applicable rules is crucial. In contested matters, there are for example some exceptions to the discovery rules otherwise applicable, and most notably, these include exceptions to the various mandatory requirements contained in Fed. R. Bankr. P. 7026(a) and (f). See Fed. R. Bankr. P. 9014(c). Particularly with the recent changes to the Rule 26 of the Federal Rules, effective December 1, 2010 (relating to expert witness disclosures), these

exceptions can be quite significant. Essentially, the changes to Rule 26 extended work product protection to draft reports and lawyer/expert communications, but opened up the way for discovery into certain aspects of the expert's analysis. In a contested matter, however, there is no mandatory initial disclosure, and no duty to disclose expert reports as part of that disclosure.

On this issue, Fed. R. Bankr. P. 9014(c) provides in part:

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> Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

Subpoenas may be issued under Rule 9016 in all cases under the Code (incorporating Fed. R. Civ. P. 45 in its entirety), and in addition to the 7000 series, various other rules of civil procedure have analogs in the rules governing bankruptcy procedure. These include:

Fed.R. Civ. P	Analogous Fed. R. Bankr. P.
6	9006
7(b)	9013
10(a)	9004(b)
11	9011
38, 39	9015(a)-(e)
47-51	9015(f)
43, 44, 44.1	9017
45	9016
58	9021
59	9023

60	9024
61	9005
63	9028
77(a), (b), (c)	5001
77(d)	9022(d)
79(a)-(d)	5003
81(c)	9015(a), 9027
83	9029
92	9030

See the Advisory Committee Notes to Rule 7001.

C. Miscellaneous Proceedings.

(i) 341 Meetings. Shortly after the commencement of a case, the U.S. Trustee's office will organize a meeting of creditors under Section 341 of the Bankruptcy Code. The meeting is not a court hearing but typically, the meeting will be recorded. Creditors who attend are entitled to ask questions and the Debtor or its representatives will be under oath. Often, getting a transcript of the audio recording will be useful in the event of further litigation down the road, as it can sometimes be used for impeachment and sometimes simply to show the Debtor's refusal to cooperate or be forthcoming about details of the case. Informal as it is, a 341 meeting can provide valuable discovery.

(ii) 2004 Exams. In the absence of a pending adversary proceeding or a contested matter, a party in interest in a bankruptcy case may still conduct (and receive) formal discovery under Rule 2004 of the Federal Rules of Bankruptcy Procedure. Upon motion of any party, the Court may, under Rule 2004(a), order the examination of any entity, so long as the examination relates to the "acts, conduct or property or to the liabilities and financial conditions of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge;" all under Fed. R. Bankr. P. 2004(b). As noted, subpoenas in aid of the examination may be issued under Rule 9016. Unlike depositions in a civil matter governed by a

relevance standard, the scope of a 2004 examination is generally fairly broad. The courts generally refer to it quite plainly as a "fishing expedition." See In re Duratech Indus. , 241 Bankr. 283 (ED NY 1999); In re Ionosphere Clubs, 156 Bankr. 414, 432 (SDNY 1993).

Nevertheless, when the scope of a proposed 2004 exam relates to matters already in issue in a pending adversary proceeding, a motion seeking authority to conduct the exam may be denied. See e.g. In re Bennett Funding Group, Inc., 203 Bankr. 24 (Bankr. ND NY 1996). Also, the court may sometimes be persuaded to limit the time or scope of such an exam, even if it is not denied outright.

(iii) Estimation Proceedings. One particular type of a contested matter bears noting here: an estimation proceeding under § 502(c) of the Bankruptcy Code.[†] In many instances, the value of a claim in litigation will have to be estimated, sometimes "for voting purposes" and sometimes for all purposes. If litigation over a contested matter can compress complex litigation into a matter of a few weeks (e.g. in the context of a claim objection), the estimation proceeding can often entail briefs and one hearing (something akin to a motion for summary judgment), and the outcome will dictate the weight your client's vote will have in any subsequent confirmation proceedings.

(iv) Special Treatment of Valuation Experts in Bankruptcy Court. Valuation of assets is often critically relevant to many disputes in bankruptcy court. Motions for relief from the automatic stay, claims litigation, confirmation hearings, and motions for the determination of secured status are all examples of issues that may well involve valuation testimony, usually by an expert. The first rule in dealing with valuation hearings is to know the way the judge will

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[†] Section 502(c) provides in part: There shall be estimated for purpose of allowance under this section –

(1) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case. . . .

proceed with such evidence. A call to the judge's courtroom deputy will provide an answer, if the court has not issued a prehearing procedural order. In this District, the judges will often order that the expert provide a report or appraisal summary stating the opinion of value and its basis, which submission will be considered the direct testimony of the expert at the hearing. The expert will be required to appear at the hearing for cross examination, or the report or appraisal will be stricken. The bankruptcy judges are, for all practical purposes, experts themselves on valuation standards and techniques, so this aspect of the testimony need not be highlighted. As is so often the case in litigation, the rules and procedural context of the dispute are essential to achieving your client's goals, and the well-prepared advocate will have these things firmly in mind.

October 16, 2012

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	)	Chapter
	)	Case No. (FJB)
Debtor	)	
Plaintiff	)	Adversary Proceeding
v.	)	No.
Defendant	)	

PRETRIAL ORDER

1. The Court enters this order in an effort to expedite the disposition of the matter, discourage wasteful pretrial activities and improve the quality of the trial through thorough preparation. The parties are strongly urged to consider resolving their dispute by mediation.

2. The parties are ordered to confer as soon as possible pursuant to Fed.R.Civ.P.26, made applicable to this proceeding by Fed. R. Bankr. P. 7026, no later than thirty (30) days from the date of this Order.

3. The parties shall file within fourteen (14) days of the Rule 26(f) conference a certification that the Rule 26(f) conference has taken place, as well as a written report outlining a proposed discovery plan including all topics covered by Rule 26(f). **The written report shall state that the parties have complied with the automatic disclosure provisions of Rule 26(a)(1) and (2) or contain an explanation of**

why the parties have not yet complied as well as a description of what actions the parties are taking to comply with Rule 26(a)(1) and (2).

The written report shall also contain the estimated length of trial.

4. Discovery shall be completed ninety (90) days from the date of this order, unless the Court, upon appropriate motion and/or consideration of the discovery plan, alters the time and manner of discovery.

5. The parties are ordered to file, within thirty days of the completion of discovery, a Joint Pretrial Memorandum approved by all counsel and unrepresented parties,[1] which shall set forth the following;

(a) The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, together with any objection to the calling of the witness, see (E) below.

(b) A list of witnesses whose testimony is expected to be presented by means of a deposition and, if taken stenographically, a transcript of the pertinent portions of the deposition testimony, together with objection to such testimony, see (E) below.

(c) A list of witnesses intended to be called as experts, together with any objection to the calling of such expert, see (E) below.

(d) An appropriate identification (pre-numeration) of each document or other exhibit, other than those to be used for

[1] If the parties cannot cooperate in filing a Joint Pretrial Memorandum, then each shall be responsible for filing, by the same date, a separate Pretrial Memorandum that conforms to the requirements set forth in this paragraph. In the event that the parties cannot cooperate in filing a Joint Pretrial Memorandum, they shall report the reasons therefore in their separately filed Pretrial Memorandum.

impeachment, in the sequence in which they will be offered, including summaries of other evidence, separately identifying those exhibits which the party expects to offer and those which the party may offer if the need arises.

(i) the parties shall bring sufficient copies of all exhibits to Court for trial so that a copy is available for the Court (for recording purposes), and other parties in the event the evidence presentation equipment is not operating. Exhibits shall be assembled in notebooks tabbed with appropriate exhibit numbers and shall be available at the commencement of trial.

(ii) Counsel may, but need not, file trial briefs, which shall be filed seven (7) days prior to trial, unless a shorter period is specified by the Court.

(iii) Counsel may be required to submit proposed findings of fact and conclusions of law at the conclusion of trial.

JUDGE BAILEY'S COURTROOM IS NOW EQUIPPED WITH AN ELECTRONIC EVIDENCE PRESENTATION SYSTEM FOR YOUR EASE AND CONVENIENCE IN DISPLAYING TRIAL EXHIBITS. WE EXPECT ALL ATTORNEYS TO MAKE USE OF THIS EQUIPMENT. PLEASE CONTACT JUDGE BAILEY'S COURTROOM DEPUTY, REGINA BROOKS, FOR THE PARTICULARS AND A DEMONSTRATION. Regina_Brooks@mab.uscourts.gov or call at (617) 748-5347.

(e) A specific statement of any objection, together with the grounds therefor, reserved as to the admissibility of deposition testimony designated by another party and/or to the admissibility of documents or exhibits. Objections not so disclosed, other than objection under Rules 402 and 403

of the Federal Rules of Evidence, shall be deemed waived unless excused by the Court for good cause shown.

(f) A statement confirming that the parties have exchanged copies **(either electronic or paper copy)** of the exhibits.

(g) A statement indicating the parties' positions on attempting to resolve their dispute by mediation. In the event the parties agree to mediation, the Court will liberally consider any motion to postpone the trial to accommodate the mediation.

(h) Facts to which the parties have stipulated.

(i) The issues of fact which remain to be litigated (evidence at trial shall be limited to these issues).

(j) The issues of law to be determined.

(k) A brief statement summarizing the Plaintiff's case.

(l) A brief statement summarizing the Defendant's case.

(m) Any revisions of the estimated length of trial since the filing of the written report required under #3 above.

(n) Disclosures as required under Fed.R.Bankr.P.7026 (2) relating to expert witnesses shall be made seven (7) business days prior to the date fixed for the filing of the joint Pretrial Memorandum, unless another time or sequence is set by the Court.

6. A pretrial conference or trial shall be scheduled after the filing of the Joint Pretrial Memorandum.

7. Any dispositive motions must be filed no less than seven (7) business days prior to the date fixed for the filing of the joint Pretrial Memorandum or the relief sought in such motions shall be deemed to have been waived; and if such motion is filed, the parties shall provide a

hard copy to the Court.

8. Failure to strictly comply with all of the provisions of this order may result in the automatic entry of a dismissal or a default as the circumstances warrant in accordance with Fed. R. Civ. P. 16, made applicable to this proceeding by Fed. R. Bankr. P. 7016.

At Boston, Massachusetts this day of , 20 .

Frank J. Bailey
U.S. Bankruptcy Judge

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	)	
	)	
,	)	**Ch**
	)	**Case No**
	)	
_____	)	

CONTESTED MATTER PRE HEARING ORDER

RE:

1. The Court enters this order in an effort to expedite the disposition of the matter, discourage wasteful pretrial activities and improve the quality of the trial through thorough preparation. The parties are strongly urged to consider resolving their dispute by mediation. **All Federal Rules of Bankruptcy Procedure applicable to adversary proceedings shall apply in this contested matter.**

2. The parties are ordered to file by _____ a Pre-Hearing Memorandum approved by all counsel and unrepresented parties, (if the parties cannot cooperate in filing a Joint Pretrial Memorandum, then each shall be responsible for filing, by the same date, a separate Pretrial Memorandum that conforms to the requirements set forth in this paragraph. In the event that the parties cannot cooperate in filing a Joint Pretrial Memorandum, they shall report the reasons therefore in their separately filed Pretrial Memorandum), which shall set forth the following;

(A) The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, together with any objection to the calling of the witness (see paragraph (e) below).

(B) A list of witnesses whose testimony is expected to be presented by means of a deposition and, if taken stenographically, a transcript of the pertinent portions of the deposition testimony, together with objection to such testimony (see paragraph (e) below).

(C) A list of witnesses intended to be called as experts, together with any objection to the calling of such expert (see paragraph (e) below).

(D) An appropriate identification (pre-numeration) of each document or other exhibit, other than those to be used for impeachment, in the sequence in which they will be offered, including summaries of other evidence, separately identifying those exhibits which the party expects to offer and those which the party may offer if the need arises.

Judge Bailey's courtroom is now equipped with an electronic evidence presentation system for your ease and convenience in displaying exhibits. We expect all attorneys to make use of this equipment. Please contact Judge Bailey's Courtroom Deputy, Regina Brooks, for the particulars and a demonstration. Regina_Brooks@mab.uscourts.gov or call (617) 748-5347.

Parties shall bring sufficient copies of all exhibits to Court for the evidentiary hearing so that a copy is available for the Court (for recording purposes), and other parties in the event the evidence presentation equipment is not operating. Exhibits shall be assembled in notebooks tabbed with appropriate exhibit numbers and shall be available at the commencement of trial.

Counsel may, but need not, file trial briefs, which shall be filed seven (7) days before trial, unless a shorter period is specified by the Court.

Counsel may be required to submit proposed findings of fact and conclusions of law at the conclusion of trial.

(E) A specific statement of any objection, together with the grounds therefor, reserved as to the admissibility of deposition testimony designated by another party and/or to the admissibility of documents or exhibits. Objections not so disclosed, other than objection under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the Court for good cause shown.

(F) A statement confirming that the parties have exchanged copies (either electronic or paper copy) of the exhibits.

(G) A statement indicating the parties' position on attempting to resolve their dispute by mediation. In the event the parties agree to mediation, the Court will liberally consider any motion to postpone the trial to accommodate the mediation.

(H) Facts to which the parties have stipulated.

(I) The issues of fact which remain to be litigated (evidence at the evidentiary hearing shall be limited to these issues).

(J) The issues of law to be determined.

(K) A brief statement summarizing the Movant's case.

(L) A brief statement summarizing the Respondent's case.

(M) **An Evidentiary Hearing is scheduled _____.**

3. Failure to strictly comply with all of the provisions of this order may result in the automatic entry of a dismissal or a default as the circumstances warrant in accordance with Fed. R. Civ. P. 16, made applicable to this proceeding by Fed. R. Bankr. P. 7016.

At Boston, Massachusetts this th day of_____.

_____

Frank J. Bailey
U.S. Bankruptcy Judge